Supreme Court, U.S.
FILED
FEB 17 1994
FEB 1994
OFFICE OF THE CLERK

(5)

No. 93-1092

In The

SUPREME COURT OF THE UNITED STATES

October term, 1993

E.DON SMITH pro se, EILEEN SMITH pro se
Petitioners

v.

ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH and THE HISTORICAL SOCIETY OF THE TOWN OF GREENWICH, and ANITA DE LESSUPS KEEFE.
Respondents

On Petition for Writ of Certiorari
To The Connecticut Supreme Court

PETITIONERS' REPLY BRIEF TO OPPOSITION

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INTRODUCTION - HISTORY OF COUNSELORS

The petitioners E.Don and Eileen Smith pro ses, between 1987 and 1994 have dealt with opposition from five different counselors from the Town of Greenwich, and The Historical Society. The two most junior ones are Ms Joyce Young who began with Connecticut Supreme Court, and Mr John Yavis, who started with his current opposition document.

Since the Smiths have represented themselves, through the Planning and Zoning process, (then used Counsel for the Zoning Board of Appeals), then defended themselves (without legal counsel) through The Superior Court, The Appellate Court, and the Conn Supreme Court, they are familiar with the briefs, the Court decisions and all the Court Transcripts.

Many accusations were made by both counselors which **are in opposition to**

"the facts" stated within the **Overall Record.** The following clarifications are submitted to the Court.

INTRO - DESCRIPTION OF HISTORIC DISTRICT

In contrast to Town of Greenwich' description of the Historic District, it is 23 houses, all tiny except 3. The zone is 7,500 s.f. per lot; 13 lots are nonconforming, averaging 5,000 to 6,000. All houses are only 25 ft or less, from the street except 3. Only 6 are historic, the rest were built between 1930 and 1987. The most recent was constructed by the Historical Society. Most of the houses have no architectural features and over 1/2 were contractual speculative homes.

The only sweeping lawns are the petitioners and one neighbor. The petitioners' property is 33,000 s.f. which could easily accommodate a home with a 1200 s.f. footprint in the corner

of the front, and still display a sweeping appearance.

I. CORRECTION OF MISSTATEMENT OF FACTS

A. DISCUSSION OF DUE PROCESS

Respondent claim : 1. Plaintiffs never protested the vagueness of the terms "**health and safety** " until the U.S. Supreme Court.

Petitioner correction: 1. This is an illogical argument. These terms were mentioned for the very first time by the Connecticut Supreme Court: "...the charter provision giving the commission the power to protect 'public health and safety' includes the power to protect the environment, which in turn includes historic preservation." Smith v. Zoning Bd. of Appeals 227 Conn. 71 (1993). The Supreme court decided to utilize these vague new terms which had never been used throughout two levels of zoning hearings and two levels of state courts. Because the Appellate Court had struck down the use of the TOWN PLAN of DEVELOPMENT as the root of historic

factors, the Supreme Court had to search for something to support them. They created a double extrapolation of artificial interpretations.

The Supreme Court's decision is in error. The assurance of "public health and safety" would already be guaranteed by the compliance with all subdivision and zoning regulations anyway.

The U.S. Supreme Court must intervene to enforce the 14th amendment and protect substantive due process rights.

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty-- indeed, are under a solemn duty--to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, **a statute purporting to have been enacted to protect the public health,** the public morals, or the public **safety, has no real or substantial relation to those objects,** or is a palpable **invasion of rights** secured by the fundamental law, **it is the duty of the courts** to so adjudge, and thereby **give effect to the Constitution.**" (emphasis added). Mugler

v. Kansas, 123 U.S. 623 at 661 (1887).

Respondent Claim: 2. The Historic Society's counsel claims the Town Plan of Development is a regulatory instrument endorcing historical factors and historical streetscapes as regulations.

Petitioners Correction: 2. Both the Appellate and Supreme Courts concur that Section 98 of the Greenwich Town Charter prohibits use of the Town Plan of Development to obstruct a subdivision.

Respondent claim : 3. Plaintiffs did not brief or argue claims of due process within ZBA and within the first two state courts.

Petitioner correction: 3. This is in error. A review of all three of plaintiffs' briefs will demonstrate how thoroughly these issues were presented for review. Counsels should also refer to all four transcripts.

ZBA - DUE PROCESS

At the ZBA hearing, Plaintiffs' attorney raised the following Due Process issues: **1.** Requested a fair hearing. **2.** Noted that plaintiffs did not have notice that they could not subdivide in an Historic District. **3.** Exposed subdivision regulations as impossibly vague and ambiguous re Historic Factors **4.** Demanded that Plaintiffs' Constitutional property rights be honored. **5.** Stated that to deny this legal subdivision would be confiscatory.

At the same ZBA hearing, the chairman and a board member, both admitted that there was **nothing in the regulations** that discusses the **impact of an historic district on sub divisions.** See Appendix A for exact quotations.

SUPERIOR CT ORAL ARGUMENTS - DUE PROCESS

Page 14: PLAINTIFF: "They (ZBA) acted beyond their discretion in denying our subdivision. They had no valid reasons, had improper motives and were dishonest".

(Plaintiff read the following into the record:) From the ZBA April 89 transcript on page 103 from Mr. Emmanuel, one of the Appeal Board Members: "My problem is I don't see anything in the subdivision regulation that says that the Commission shall turn down or may turn down a subdivision application because **even though it complies with all the requirements they just don't like it.**

In his last quote from Mr Emmanuel on page 104: "**What authority does the Commission have to turn these people down? They have complied** with all the zoning regulations and everything the staff said they should do."

The above quotes substantiate that Plaintiffs **did raise** the issue of the **lack of due process.**

Respondents Claim: 4. The Superior and Appellate Court decisions did not address due process.

Petitioners correction 4.

Respondent Young has failed to see that the **Superior Court** and the

Supreme Court both made the following conclusion: The regulations are specific and the plaintiffs had notice.

Respondent Young accepts the Supreme Court's label that this is a due process analysis, but since the Superior court failed to label it "due process" the respondent was blind to it.

The **Appellate Court** recognized that the Plaintiffs' due process had been denied and reversed the Superior Court decision stating: "...**the statutes setting forth substantive and procedural subdivision requirements do not authorize the inclusion of historical factors, the reasons given by the board for the denial were not based on known and fixed standards...**" Smith v Zoning Bd. of Appeals 28 Conn. App. 29 (1992).

"There is denial of Due Process where inherently vague statutory language permits selective law enforcement." Smith v. Goguen (1974) 415 U.S. 566.

This petition for certiorari is valid because due process has been addressed within the state courts.

B. DISCUSSION OF DISCRIMINATION

Respondents claim: 1. The claim of discrimination was not mentioned before the board and there is no evidence.

Petitioners correction: 1.

This is an uninformed assertion. Discrimination charges have been raised at every level since the ZBA hearing and one has only to read the transcripts to find sufficient evidence.

ZBA HEARING LEVEL - DISCRIMINATION

Both the ZBA chairman and at least one ZBA member opened the meeting with blatant statements of predisposition. The Chairman stated that he had a letter from the Chairman of the Historic District stating that no house would be acceptable on the front property. The ZBA Chairman further stated that this " de nova" hearing would be a waste of time. (See Appendix B, for quotes.)

During the hearing, the Chairman of

the Historic District Commission testified that they had had a meeting and voted (without a submission for Certificate of Appropriateness) that no house would be acceptable on the front lot. (See Appendix B, for quotes).

SUPERIOR COURT LEVEL - DISCRIMINATION
ORAL ARGUMENT TRANSCRIPT

1. PREDISPOSITION

Within the Oral argument of the Superior Court, the Plaintiffs submitted a list of the page and line number of more than 30 predisposed comments by both the ZBA members, ZBA Chairman, and the Chairman of the Historic District Commission. The list was accepted the court without objection. See Appendix C.

Page 28, PLAINTIFF: "...the Planning Zoning Appeals Board was predisposed with their decision and did not perform judicial responsibilities as a body without prejudice."

2. UNEQUAL TREATMENT

Page 25, PLAINTIFF: Therefore, our

property interest entitles us to sue for the deprivation of our right to subdivide. We are entitled to equal protection under the law. **Under the same historic district and subdivision regulations, the Historic Society was treated differently than we were since they were allowed to build."**

Page 53, PLAINTIFF: "Relative to the construction by the Historic Society, everybody always says, well, you can't see it from the street. I have three photographs of the structure here that you were asking about. It's almost 2,900 square feet, and I have two pictures that view it from the street. If you'd like for me to submit it to the court."

These Photographs of the new structure erected by the Historic Society within the Historic District were accepted into the Record as noted on Page 54 of the Transcript as **evidence of unequal treatment** under the law.

Respondents Claim: 2. Neither the trial court nor the appellate court addressed discrimination.

Petitioners Corrections: 2. The fact that both of these **courts were**

well aware of the discrimination issue is revealed in the oral argument transcripts.

SUPERIOR COURT ORAL ARGUMENT TRANSCRIPT

Page 57. SUPERIOR COURT JUDGE: "...he (Plaintiff) seems to question the trustworthiness of the public officials to give him a fair hearing without a predisposition, which is of course one of the standards."

Page 56. SUPERIOR COURT JUDGE: "The second (ultimate issue for me) is whether the Board was predetermined."

Page 54. SUPERIOR COURT JUDGE: "You don't object? They (photographs of the Historic Society new structure)may be submitted to the clerk, then."

The above quotes reveal that the Trial Court was very aware of the claim of discrimination. However, the **Trial Court erred by not evaluating and not deciding** the Plaintiffs' case of **discrimination.** Plaintiffs were not satisfied that their complaints were fairly heard in the trial court, so they appealed to the next higher court.

APPELLATE COURT IDENTIFICATION OF LOWER COURT DISCRIMINATION

It is apparent from the following quote from the Memorandum of Decision that the Court believed that there was discrimination:

"At oral argument, the board's counsel conceded that if the subject property was not located in an historic district, but in another R-7 zone, the application would have been approved because it met all the regulations not concerned with "historic." Smith v. Zoning Bd. of Appeals 29 Conn. App. 28.

The Appellate Court agreed that there was discrimination because they overturned the ZBA and the Trial court's decision.

Respondents Claim: 3. Supreme Court declined to review discrimination for wont of a sufficient record.

Petitioners Correction: 3. The Supreme Court **claims** that plaintiffs only peripherally raised this claim before the board and never corroborated it with evidence.

Apparently, the **judges failed to review** all three of the plaintiffs' briefs and the transcripts of ZBA and of all three courts for repeated claims of discrimination, as well as the photographs of the new building just two doors down.

"Due process is secured if laws operate on all alike, and do not subject individuals to arbitrary exercise of powers of government." Missouri P.R. Co. v Mackey (1988) 127 U.S. 205.

C. DISCUSSION RE TAKING

Respondent claim: 1. "Its not ripe"

Petitioner correction: 1. There is no justification for requesting the Plaintiff to submit alternatives when their **plan is within compliance** of all known statutes and regulations.

The Appellate court, by approving the existing subdivision plan, determined that subdivision alternatives were not required.

The Connecticut Bar Association,

within their Amicus Curiae Brief further upheld the legality of this subdivision proposal, which eliminated the need for alternatives.

The U.S. Supreme Court has supported other taking claims without insisting on executing alternatives (ie, free throws, new plans, special permits, changing zoning codes, etc.)

From the landmark takings case, Lucas v S. Carolina Coastal Council 112 S.Ct. 2886 (1992): "Lucas' takings **claim is not rendered unripe** by the fact that he may yet be able to secure a special permit to build on his property..."

Respondent claim : 2. "Plaintiff has not been deprived of a free-throw lot by denial of the subdivision proposal.

Petitioner correction: 2. The issue at hand is a subdivision into 3 properties which is in full compliance with the zoning code and the subdivision regulations.

It is physically impossible to create three properties while excluding the use of the front half of the property. That front portion constitutes a legal building lot referred to as a "free-throw lot" which was confirmed by the P&Z Director. (See Record p.14). **To prevent 100% use of that legal lot is a taking;** and to prevent this legal triple subdivision is the **taking of two building lots** without just compensation.

Respondent claim : 3 Plaintiffs have alternatives.

Petitioner correction: 3. Plaintiffs **have no other alternative within the existing zoning code.** The ZBA Hearing Transcript quotes the **ZBA Chairman refusing to approve development in the back** of the property (Part I pg.58) and the **Chairman of the Historic District Commission refusing to approve any house on the front lot** (Part II pg. 86)

Where does the respondent think the alternatives can be?

"If the commissioner made it clear by repeated rejections of applications, that he would never approve an application, there would be a **taking**." Brecciaroli v EPA 168 Conn 349.

Respondent claim : 4. There was no claim to a diminution in value of the taking.

Petitioner correction: 4. This is an error. Within all three briefs submitted to all three state court levels, there was a detailed analysis of financial loss of the 100% confiscation of the front building lot:

Plaintiffs' Briefs: Superior Ct. p.5,6 Appellate Ct. p.23, Supreme Ct. p.25.

Respondents claim: 5. Victorian Realty Group v City of Nashua, 534 A.2d 381 (1987) is a case which decided a comparable issue.

Petitioners' Correction: 5. It is crucial to point out that Victorian Realty Group was looking for a zone

change to commercial and multi-family use, and wanted to cut a new street down the middle of the property.

In contrast, plaintiffs only want to use their property just like their neighbors, to build a small house on a small lot, within all existing regulations.

II. SUMMARY and JURISDICTION

If the Connecticut Supreme Court is allowed to obstruct the construction of a house on a piece of land by simply saying that it would be a hazard to the public health and safety, then clearly, citizens' property rights are being taken away.

"Constitutional requirement of definiteness is violated by...enactment that fails to give person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." U.S. v Harriss (1954) 347 U.S. 612.

Concurrently, the Court has looked

the other way while the same rules were applied differently to Plaintiffs' neighbor who was allowed to build.

"It is only when variations (of state's treatment of persons) are arbitrary and without reasonable legal basis that unconstitutional discrimination occurs." U.S. v Burnison 339 U.S. 87 (1950)

The Town Attorney said, "Interpretation of state statutes is uniquely a matter of state law." Plaintiffs response is that the U.S. Supreme Court needs to be involved.

"The test to measure the validity of a state statute under the due process clause of the 14th Amendment is whether statute is contrary to fundamental principles of liberty and justice." Re Groban (1957) 352 US 330.

Clearly, this is a Type I Due Process case of constitutional law: "The state court has unjustly discriminated against (the plaintiff as) an individual, and against (the Historic District residents as) a group." Kauper, Paul and Beytagh, Francis, Constitutional Law. Little Brown & Co: Boston, 1980.

The U.S. Supreme court exists to

help correct error in the lower courts

per 28 USCA $1257(a) "...where the validity of a state statue of any state is drawn into question on the grounds of its being repugnant to the Constitution..."

The U.S. Supreme Court should intervene to protect the rights of the 5th and 14th Amendments of the Constitutional and of the Civil Rights Act of 1871 (42 USCS Sec 1983).

CONCLUSION

For all the foregoing reasons, E.Don and Eileen Smith, the petitioners, respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

ZBA HEARING TRANSCRIPT RE DUE PROCESS

Issues re due process were clearly addressed as evidenced by the following extracts within the ZONING BOARD OF APPEALS HEARING TRANSCRIPT.

RE DUE PROCESS - FAIR TRIAL

Plaintiffs' Attorney:

PART I p.26 line 19 "But of all the equities and rules of fairness and the citizens' rights, the rights of one little private citizen...we're talking about law; **this is fairness and justice**...needs to be felt by you as a commission in your deliberations on this matter.

RE DUE PROCESS - SPECIFIC STANDARDS

PLAINTIFFS'ATTORNEY

PART I p. 24 line 14 "But nothing in our state statutes or our state law providing for historic districts prevents a man from subdividing his property. There isn't anything in the historic district statute of the state of Connecticut or in the ordinance of Greenwich that says you can't subdivide the property."

PART I p.61 line 24 "...when they created the idea of a historic district, they didn't say you can't do anything with your property."

Part II p. 113 line 22 "...the commission's (P & Z) decision was improper as it premised its decision on

an impossibly vague and ambiguous subdivision regulation."

ZBA CHAIRMAN

PART II page 113 line 8, "...but as far as subdivisions go, I'm not aware of any regulations in a historic district."

ZBA BOARD MEMBER

PART II page 94 line 20 "But there's nothing in the regulations that discusses the impact of a historic district on subdivisions."

RE DUE PROCESS-CONSTITUTIONAL RIGHTS

PLAINTIFFS' ATTORNEY:

PART I page 65 line 5 "...I mean the valuable constitutional and ownership rights of Mr. and Mrs. Smith..."

PART I page 68 line 12 "I said to balance his (Plaintiff's) constitutional rights as an American citizen and a citizen in the town of Greenwich as against the masses."

PART I page 63 line 8 "...They (Historic District Commission) didn't mean to take property rights away from people when they would comply with the shape, the size and all the other requirements..."

PART I page 41 line 24 "...they (historical statutes) never intended that you couldn't make use of the property at all. That would be **confiscatory.**"

APPENDIX B

ZBA HEARING TRANSCRIPT
EXCERPTS ON DISCRIMINATION

PLAINTIFFS'ATTORNEY ASKED FOR A FAIR TRIAL:

PART I p.9 line 17 "...my job here tonight, is to make your board, as a judicial body, cognizant of the fairness and of the equity of this matter or the **lack of fairness and equity.**"

The following discriminatory statements are quoted directly from the ZBA transcript.

Opening statement by the Chairman of the ZBA Hearing, Transcript, Part I, page 5, line 22 quote:

[CHAIRMAN LYNCH: Before you start, Mr. Peden (Plaintiffs' attorney) I'd like to ask you a question. Do you have to get a certificate of appropriateness from the Historic District Commission?

MR PEDEN: To build a house?

CHAIRMAN LYNCH: Yes.

MR PEDEN: Yes.

CHAIRMAN LYNCH: So you'll need their approval?

MR PEDEN: Absolutely.

CHAIRMAN LYNCH: As you know, because I have a letter from the Chairman, Marcia Coyle, of the Historic District Commission in which she represents that the district opposes this application, that they did this before the Planning and Zoning Commission and they oppose it tonight.

So my question is to you, sir, **what**

is the point of our going through all of this we have to do to hear it and decide this case if we know that the district is not going to issue a certificate of appropriateness?"

This negative opening remark by the Chairman, sets the stage, to his board members of his predisposed feelings on this Hearing.

CHAIRMAN OF THE HISTORIC DISTRICT COMMISSION SPEAKING TO THE ZONING BOARD OF APPEALS:

PART II p.86, line 14: "It would be difficult for us to approve a house on lot number one when our position is that we don't want them to build on lot number one. It would be difficult to approve any house on the site plan when, in actuality, we don't want a house there."

ZBA MEMBER: MR. RADER: "We understand that."

ZBA CHAIRMAN LYNCH: This is one of the things that is bothersome. If the Historic District Commission was not going to approve any house, what was the point of ending up here?"

ZBA MEMBER MR. RADER: "In other words, if the applicant had known in the beginning that you were not going to approve anything on lot number one, the front of the property, that would have been the end of the story, right?"

ZBA CHAIRMAN LYNCH: "I suppose...we could take the position tonight that as long as they are not going to approve any building that the question is moot for our decision." ...

PLAINTIFFS' ATTORNEY PEDEN: "I take respectful exception to that Mr. Chairman."

ZBA MEMBER MR RADER: "It would be a very neat package if we could do that and we could fold up the papers and go home."

Once more, we now have a predisposed attitude by both the ZBA Chairman and one other ZBA member.

APPENDIX C

LIST OF PREDISPOSED STATEMENTS FROM THE TRANSCRIPT OF THE ZBA HEARINGS

THE FOLLOWING PAGES AND COMMENT NUMBERS INDICATE REMARKS THAT HAVE BEEN MADE WITHIN THE HEARING THAT WOULD QUESTION THE PREDISPOSITION OF MEMBERS OF THE BOARD AND HISTORIC DISTRICT COMMISSION AND CHAIRMAN.

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